

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

H. LLOYD PARKER,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

NO. CV-10-318-RHW

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 16 and Defendant's Motion for Summary Judgment, ECF No. 19. The motions were heard without oral argument. Plaintiff is represented by Rebecca M. Coufal. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Michael Howard.

I. Jurisdiction

On December 13, 2007, Plaintiff H. Lloyd Parker filed an application for Supplemental Social Security Income (SSI) and Social Security Disability Insurance Benefits (SSDIB). Plaintiff alleges that he has been disabled since May 27, 2003.

His application was denied initially on March 10, 2008, and again denied on reconsideration on May 21, 2008. A timely request for a hearing was made. On January 27, 2010, Plaintiff appeared at a video hearing in Wenatchee, Washington before Administrative Law Judge (ALJ) Jean R. Kerins, who was located in

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1 Metairie, LA. Kasey C. Suggs, vocational expert, also appeared at the hearing.
 2 Plaintiff was represented by Randy Fair.

3 The ALJ found that Plaintiff was not disabled from May 27, 2003 to
 4 September 30, 2009, but became disabled on October 1, 2009. Plaintiff timely
 5 requested review by the Appeals Council, which was denied August 10, 2010. The
 6 Appeals Council's denial of review makes the ALJ's decision the final decision of
 7 the Commissioner. (42 U.S.C. §405(h)). Plaintiff filed a timely *pro se* appeal with
 8 the U.S. District Court for the Eastern District of Washington on November 10,
 9 2010. An amended complaint was filed by Plaintiff's attorney on October 26,
 10 2010. The instant matter is before the district court pursuant to 42 U.S.C. § 405(g).

11 **II. Sequential Evaluation Process**

12 The Social Security Act defines disability as the "inability to engage in any
 13 substantial gainful activity by reason of any medically determinable physical or
 14 mental impairment which can be expected to result in death or which has lasted or
 15 can be expected to last for a continuous period of not less than twelve months."
 16 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
 17 under a disability only if his impairments are of such severity that the claimant is
 18 not only unable to do his previous work, but cannot, considering claimant's age,
 19 education and work experiences, engage in any other substantial gainful work
 20 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

21 The Commissioner has established a five-step sequential evaluation process
 22 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
 23 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

24 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
 25 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
 26 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
 27 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
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1 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
2 416.920(b). If he is not, the ALJ proceeds to step two.

3 Step 2: Does the claimant have a medically-severe impairment or
4 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
5 claimant does not have a severe impairment or combination of impairments, the
6 disability claim is denied. A severe impairment is one that lasted or must be
7 expected to last for at least 12 months and must be proven through objective
8 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
9 severe, the evaluation proceeds to the third step.

10 Step 3: Does the claimant's impairment meet or equal one of the listed
11 impairments acknowledged by the Commissioner to be so severe as to preclude
12 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
13 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
14 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
15 impairment is not one conclusively presumed to be disabling, the evaluation
16 proceeds to the fourth step.

17 Step 4: Does the impairment prevent the claimant from performing work he
18 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
19 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
20 perform this work, the ALJ proceeds to the fifth and final step.

21 Step 5: Is the claimant able to perform other work in the national economy
22 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
23 416.920(f).

24 The initial burden of proof rests upon the claimant to establish a prima facie
25 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
26 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
27 mental impairment prevents him from engaging in his previous occupation. *Id.* At
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1 step five, the burden shifts to the Commissioner to show that the claimant can
2 perform other substantial gainful activity. *Id.*

3 **III. Standard of Review**

4 The Commissioner's determination will be set aside only when the ALJ's
5 findings are based on legal error or are not supported by substantial evidence in
6 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
7 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
8 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
9 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
10 evidence is "such relevant evidence as a reasonable mind might accept as adequate
11 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
12 ALJ's denial of benefits if the evidence is susceptible to more than one rational
13 interpretation, one of which supports the decision of the administrative law judge.
14 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
15 support either outcome, the court may not substitute its judgment for that of the
16 ALJ." *Matney*, 981 F.2d at 1019.

17 A decision supported by substantial evidence will be set aside if the proper
18 legal standards were not applied in weighing the evidence and making the
19 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
20 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
21 immaterial to the ultimate non-disability determination. *Stout v. Comm'r, Soc. Sec.*
22 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

23 **IV. Statement of Facts**

24 The facts have been presented in the administrative transcript and the ALJ's
25 decision and will only be summarized here.

26 At the time of the hearing, Plaintiff was 43 years old, and was living with
27 his father. He graduated from high school and attended one year of college. His
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1 prior work experience consists of working as a lube technician and as security
2 officer. He last worked as a security officer in 2003, where he was certified to
3 carry a firearm. He quit because his supervisor did not like him. Between 2005-
4 2006, he was incarcerated for non-payment of child support, and then for
5 smuggling tobacco and marijuana back into the jail. He received a 60 day
6 sentence.¹

7 At the hearing, he spoke about his stomach problems related to his anxiety.
8 He reported his anxiety makes him not want to be around people. He explained
9 that he gets tensed up and just wants to get away from everything. He stated that
10 his anxiety increased after he quit his job. He gets fatigued and at times, he does
11 not have the energy to change his clothes or shower. He stated that he could not
12 stand for more than 15 minutes.

13 **V. The ALJ's findings**

14 The ALJ found Plaintiff to be disabled as of October 1, 2009, but not from
15 the alleged onset date of May 27, 2003. (Tr. 16.) She found that Plaintiff met the
16 insured status requirements of the Social Security Act only through December 31,
17 2008. (Tr. 15.)

18 At step one, the ALJ found that Plaintiff had not engaged in substantial
19 gainful activity since May 27, 2003, the alleged onset date of disability. (Tr. 17.)

20 At step two, the ALJ found that since May 27, 2003, Plaintiff had the
21 following severe impairments: lumbar degenerative disc disease with stenosis,
22 anxiety, obesity, and knee and shoulder problems. (Tr. 17.)

23 At step three, the ALJ found that Plaintiff's impairments or combination of
24 impairments did not meet or medically equal any of the listed impairments
25 described 20 CFR Part 404, Subpart P, Appendix 1. (20 CFR 404.1520(d),

26 ¹Plaintiff testified that he was coerced into smuggling the tobacco and
27 marijuana into the jail. He served 30 days of the sentence before being released.
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1 404.1525, 404.1526, 416.925 and 416.926). The ALJ found that the mental
2 impairment(s) did not satisfy the criteria of paragraph “C” of the applicable mental
3 disorder listing.² (Tr. 18.)

4 At step four, the ALJ found that prior to October 1, 2009, Plaintiff had the
5 residual functional capacity to perform light work as defined in 20 CFR
6 404.1567(b) and 416.967(b), except occasional climbing, ramps/stairs,
7 ladder/rope/scaffolds, balancing, stooping, kneeling, crouching and crawling, and
8 occasional interaction with the public, supervisors and coworkers. (Tr. 18.) The
9 ALJ discredited Plaintiff’s statements concerning the intensity, persistence and
10 limiting effects of his symptoms of depression and anxiety. (Tr. 19.) The ALJ
11 discredited Plaintiff’s testimony regarding his knee and shoulder pain, finding that
12 the medical evidence described daily activities that were not limited to the extent
13 one would expect, given Plaintiff’s complaints of disabling symptoms and
14 limitations. (Tr. 20.) Specifically, the ALJ discredited Plaintiff’s claim that he was
15 unable to stand more than 15 minutes given that the evidence showed he shopped
16 for groceries, drove, spent time fishing, and was the primary caretaker for his
17 father.

18 After October 1, 2009, the ALJ found that Plaintiff could perform light
19 work as defined in 20 CFR 404.1567(b) and 416.967(b), except occasional
20 climbing, ramps/stairs, ladder/rope/scaffolds, balancing, stooping, kneeling,
21 crouching and crawling, occasional interaction with the public, supervisors and
22 coworkers, and unable to sustain a competitive pace for two hours at a time. (Tr.

23 ²The ALJ found that Plaintiff had the following degree of limitation in the
24 broad areas of functioning set out in the disability regulations: moderate restriction
25 in activities of daily living, moderate difficulties in maintaining social functioning,
26 mild difficulties in maintaining concentration, persistence or pace, and no episodes
27 of decompensation, each of extended period. (Tr. 18.)
28

1 21.)

2 The significant difference between the two time periods is that the ALJ
3 found that after October 1, 2009, Plaintiff was unable to sustain a competitive pace
4 for two hours at a time. The ALJ concluded that beginning on October 1, 2009,
5 Plaintiff's allegations regarding his symptoms and limitations were generally
6 credible. (Tr. 22.) In making this determination, the ALJ relied on objective
7 medical evidence showing a herniated disc at L4-L5 causing mass effect on the
8 left L5 nerve root, pushing it posteriorly, as well as showing congenital spinal
9 stenosis involving the lower lumbar spine. (Tr. 22.) The ALJ credited Plaintiff's
10 testimony that he was unable to stand for more than 15 minutes. (Tr. 22.)

11 At step five, the ALJ found prior to October 1, 2009, Plaintiff was capable
12 of performing past relevant work as a security officer, light duty, semi skilled. (Tr.
13 22.) After October 1, 2009, the ALJ found that Plaintiff's additional limitations
14 (unable to sustain a competitive pace for two hours at a time) eroded the unskilled
15 light occupational base, and found that no jobs in the national economy existed
16 that Plaintiff could perform. (Tr. 23.)

17 **VI. Issues for Review**

18 Because the ALJ found Plaintiff to be disabled as of January 15, 2009, the
19 focus of Plaintiff's appeal is the time between the alleged onset date of October 7,
20 2004 and January 14, 2009.

21 Plaintiff presents the following issues with respect to the ALJ's findings:

- 22 1. Was the ALJ's finding that Plaintiff did not suffer severe
23 impairments of depression as well as personality disorder supported
24 by substantial evidence?
- 25 2. Did the ALJ err in rejecting the examining psychologist's testimony?
- 26 3. Did the ALJ err by not providing the necessary basis, supported by the
27 record, to find Parker credible only as far as he agreed with the ALJ's RFC?

1 4. Did the ALJ err in failing to include all of Plaintiff's limitations and
2 restrictions in posing the hypothetical to the Vocational Expert?

3 **VII. Discussion**

4 **1. Whether the ALJ erred in not listing severe impairments of**
5 **depression and personality disorder in Step Two**

6 Plaintiff argues the ALJ erred in omitting his depression and personality
7 disorder from the list of his severe impairments in Step Two. While it is true that
8 the ALJ did not specifically list depression and personality disorder in step two,
9 she specifically addressed it in her discussions throughout her Order. She
10 discussed the relevant evidence of Plaintiff's mental impairments, including
11 Plaintiff's difficulty in relating to others. *See* Tr. 19. Notably, in defining the
12 residual functional capacity, she limited Plaintiff to only occasional interaction
13 with supervisors, coworkers, and members of the public. (Tr. 18.) As such,
14 Plaintiff is unable to show that he was prejudiced by the omission in Step Two of
15 the listing of depressions and personality disorder. *See Lewis v. Astrue*, 498 F.3d
16 909, 911 (9th Cir. 2007) (holding that any error by the ALJ in neglecting to list an
17 impairment in Step 2 was harmless because the decision reflected that the ALJ
18 considered any limitations posed by the impairment at Step 4).

19 **2. Whether the ALJ erred in rejecting examining psychologists and**
20 **physician's testimony**

21 Plaintiff argues the ALJ did not consider the depressive disorder/dysthymic
22 and personality disorders diagnosed by Drs. Goodwin, MacLennan, Desire and
23 Janssen, without the assistance of a medical expert. Plaintiff argues that the ALJ
24 dismissed the medical opinions of the consulting experts and speculated on the
25 evidence. Notably, Plaintiff did not identify the portion of the decision in which he
26 contends the ALJ speculated on the evidence.

27 In evaluating opinions from treating and examining physicians, the ALJ
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1 must consider several factors: the consistency of the opinion with other evidence;
2 the physician's specialization; and the degree to which the opinion is supported by
3 the evidence. 20 CFR §§ 404.1527(d), 416.927(d). The ALJ must provide "good
4 reasons" for assigned weight to a treating physician's opinion. § 404.1527(d),
5 416.927(d).

6 In her decision, the ALJ properly discussed and accounted for the opinions
7 of treating, examining, and non-examining physicians and psychologists, and
8 incorporated their findings in determining the functional residual capacity. In the
9 end, she gave considerable weight to the opinion of examining psychologist Dr.
10 MacLennan and Dr. Gaffield's opinion, who assessed Plaintiff as capable of
11 performing light work. (Tr. 21.) Dr. Desire was not mentioned in the ALJ's
12 opinion. Plaintiff saw Dr. Desire for treatment beginning in March, 2008,
13 however, there is nothing in the record that indicates that the doctor gave opinions
14 concerning Plaintiff's ability to work. *See* Tr. 526-532. The ALJ reasonably
15 discussed the reports of examining psychologist Dr. Goodwin and did not find
16 them inconsistent with his evaluation of the evidence. (Tr. 19.) Dr. Janssen's
17 findings that Plaintiff had some difficulties in social functioning were reasonably
18 accounted for by limitations on contact with supervisors, coworkers, and the
19 general public in the ALJ's functional residual capacity finding. (Tr. 18-19.)
20 Plaintiff has not shown that the ALJ erred in her consideration of the opinions of
21 the medical providers.

22 **3. Whether the ALJ provided the necessary basis for not finding**
23 **Plaintiff credible**

24 Plaintiff asserts the ALJ did not provide specific, clear and convincing
25 reasons for not finding Plaintiff credible.

26 In her Order, the ALJ found that Plaintiff's statements concerning the
27 intensity, persistence and limiting effects of his symptoms of depression and
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1 anxiety were not credible, with respect to the period prior to October 1, 2009. She
2 based this conclusion on the fact that Plaintiff did not begin any treatment for his
3 depression and anxiety until 2005, and the record demonstrated that during this
4 time, he spent most of his days enjoying fishing. (Tr. 19.) She noted that Plaintiff
5 never sought or received treatment from a specialist; rather, all treatment had been
6 rendered by a general practitioner. (Tr. 19.) She relied on Dr. MacLennan's notes
7 that Plaintiff was socially isolated, withdrawn and had little motivation, and that
8 he had become so reclusive that he would be very stressed by the demands of a
9 work setting, but also referred to a progress note from Plaintiff's treating physician
10 that showed Plaintiff doing better with his depression. (Tr. 19.) Finally, she noted
11 that Plaintiff's descriptions of symptoms were vague and general, lacking the
12 specificity that might otherwise make them more convincing. (Tr. 19.)

13 She also concluded that Plaintiff's description of knee and shoulder pain
14 were not credible given that his daily activities were not as limited as one would
15 expect from this description of pain. (Tr. 20.) Notably, the ALJ noted that Plaintiff
16 shops for groceries, drives, and spends time fishing, as well as he takes care of his
17 father. (Tr. 20.) She noted the consultive examiner concluded that there were no
18 obvious and no significant objective findings that would present Plaintiff from
19 walking, standing, or sitting for an eight-hour day. (Tr. 20.)

20 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
21 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
22 evidence of malingering, then the ALJ must give "specific, clear and convincing
23 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v.*
24 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted); *accord Taylor v.*
25 *Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234 (9th Cir. 2011) (*citing*

1 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).³ If the ALJ's
 2 credibility finding is supported by substantial evidence in the record, the
 3 reviewing court “may not engage in second-guessing.” *Thomas v. Barnhart*, 278
 4 F.3d 947, 959 (9th Cir. 2002).

5 In recognition of the fact that an individual’s symptoms can sometimes
 6 suggest a greater level of severity of impairment than can be shown by the
 7 objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe
 8 the kinds of evidence, including the factors below, that the ALJ must consider in
 9 addition to the objective medical evidence when assessing the credibility of an
 10 individual's statements:

- 11 1. The individual’s daily activities;
- 12 2. The location, duration, frequency, and intensity of the individual’s pain or
- 13 other symptoms;

14
 15 ³Defendant argues that the Court need only determine whether the ALJ
 16 properly made “specific,” cogent findings, supported in the record, for rejecting a
 17 claimant’s subjective symptom testimony, rather than “clear and convincing
 18 evidence.” Indeed, some cases have held that, at a minimum, an ALJ must make
 19 specific, cogent findings, supported in the record, to reject a claimant’s subjective
 20 symptom testimony. *See, e.g., Berry v. Astrue*, 622 F.3d 1228, 1234 (9th
 21 Cir.2010); *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990); see also Social
 22 Security Ruling.(“SSR”) 96–7p (“When evaluating the credibility of an
 23 individual's statements, the adjudicator must consider the entire case record and
 24 give specific reasons for the weight given to the individual's statements”). The
 25 majority of cases apply the clear and convincing standard. Out of an abundance of
 26 caution, this Court shall apply the arguably more rigorous “clear and convincing”
 27 standard.

- 1 3. Factors that precipitate and aggravate the symptoms;
- 2 4. The type, dosage, effectiveness, and side effects of any medication the
- 3 individual takes or has taken to alleviate pain or other symptoms;
- 4 5. Treatment, other than medication, the individual receives or has received
- 5 for relief of pain or other symptoms;
- 6 6. Any measures other than treatment the individual uses or has used to
- 7 relieve pain or other symptoms (e.g., lying flat on his or her back, standing
- 8 for 15 to 20 minutes every hour, or sleeping on a board); and
- 9 7. Any other factors concerning the individual's functional limitations and
- 10 restrictions due to pain or other symptoms.

11 SSR 96-7P, 1996 WL 374186.

12 Here, the ALJ properly followed the procedures and regulations to
13 determine Plaintiff's credibility, and gave sufficiently specific reasons for finding
14 Plaintiff not credible for the period prior to October 1, 2009. Moreover, the
15 specific reasons were supported by the record. She found that Plaintiff was
16 engaged in daily activities, including shopping, carrying for his father, and
17 fishing⁴, that were inconsistent with his claims of disability. She found Plaintiff's
18 treatment history was inconsistent with his claim of disability.

19 As set forth above, in setting the residual functional capacity, the ALJ
20 included for both time periods the limitation of only occasional interaction with
21 the public, supervisors and coworkers, which addresses his anxiety and personality
22 disorder. This limitation was supported by the record. The ALJ properly
23 discredited Plaintiff's testimony regarding his symptoms to the extent it conflicted
24 with this residual functional capacity limitation.

25
26 ⁴Plaintiff argues that he did not go fishing as often as the ALJ suggested,
27 however, regardless of the frequency of the fishing trips, the ALJ reasonably
28 interpreted this evidence as inconsistent with a claim of disability.

4. Whether the ALJ's hypothetical to the Vocational Expert was Correct

Plaintiff argues that the ALJ failed to provide the Vocational Expert with all of Plaintiff's limitations, particularly his mental limitations, contained in the record. Plaintiff does not identify which mental limitations were unaccounted for in the hypothetical.

Here, the ALJ included all of the limitations she found to exist and these findings were supported by substantial evidence. The ALJ did not err in omitting other limitations that Plaintiff claims to have existed, but failed to prove. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

5. Conclusion

Plaintiff has not met his burden of showing that the ALJ committed legal error, or that her conclusion that Plaintiff was not disabled between May 27, 2003 and October 1, 2009 was not supported by substantial evidence.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, ECF 16, is **DENIED**.

2. Defendant's Motion for Summary Judgment, ECF No. 19, is **GRANTED**.

3. The decision of the Commissioner denying benefits between May 27, 2003 and October 1, 2009 is affirmed.

4. The District Court Executive is directed to enter judgment in favor of Defendant and against Plaintiff.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order and provide copies to counsel, and **close the file**.

DATED this 14th day of February, 2012.

s/Robert H. Whaley
ROBERT H. WHALEY
 United States District Judge

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